RESPONSE REQUESTED

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No. 87-5677

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

UNITED STATES OF AMERICA ex rel.
WARREN LEE HARRIS,

Petitioner,

vs.

MARVIN REED, Warden,

Respondent.

On A Petition For Writ Of Certiorari To The
United States Court Of Appeals For The
Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is there any reason why this Court should grant review where Harris has failed to establish a conflict among the Circuits; where, if there were a conflict, the decision below is correct and should not be disturbed; and where, if the decision below is found incorrect, on this record Harris's conviction would still be affirmed?

2. Is there any reason why this Court should grant review where this Court has already fully addressed the issue of how to interpret a state court opinion that is ambiguous as to procedural default and where there is no conflict among the Circuits on this issue?

3. Is there any reason why this Court should remand this cause for a cause and prejudice hearing where Harris has failed to make a colorable claim of cause and prejudice and where the District Court's finding of no constitutional violation on the merits demonstrates that Harris could not make a showing of prejudice?

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OPINIONS BELOW

Petitioner has attached to his petition copies of the state court opinion, the Seventh Circuit opinion, and the District Court's first opinion rejecting waiver and calling for an evidentiary hearing. Respondent attaches hereto a copy of the District Court's final opinion denying the petition for writ of habeas corpus on the merits.

JURISDICTION

Harris invokes jurisdiction under 28 U.S.C. §2101(c). However, the following argument demonstrates that Harris has not provided any reason for the Court to exercise its discretion to grant the petition.

STATEMENT OF THE CASE

This is an action in habeas corpus. Warren Lee Harris was convicted of murder by a jury in Cook County, Illinois in 1977 and sentenced to a term of 50-100 years in prison. His conviction was upheld on appeal against a challenge to the sufficiency of the evidence. Harris did not seek direct review in the Illinois Supreme Court.

Harris filed a state post-conviction petition alleging ineffective assistance of counsel, an issue not raised on direct appeal, and the petition was denied. On direct appeal, the denial was affirmed in an unpublished opinion that contained language of procedural default for failure to raise the claim on direct appeal and a discussion of the weakness of the claim on the merits. Harris did not seek review in the Illinois Supreme Court.

Harris filed a federal habeas petition in the United States District Court, again claiming ineffective assistance of trial counsel. Although the State urged that the failure to raise this claim on direct appeal was a procedural default, the district court found that the state appellate court in the post-conviction action had excused the default. The court conducted a three-day evidentiary hearing on the ineffective assistance question and then denied the petition on the merits.

The United States Court of Appeals for the Seventh Circuit affirmed the denial, without reaching the merits, on the ground that the state court did not excuse the procedural default.

REASONS FOR DENYING THE WRIT

1. There Is No Reason For This Court To Grant Review Where: Harris Has Failed To Establish A Conflict Among The Circuits; If There Were A Conflict, The Decision Below Is Correct And Should Not Be Disturbed; And If The Decision Below Is Found Incorrect, On This Record Harris's Conviction Would Still Be Affirmed.

Harris claims there is a conflict among the Circuits as to when to allow habeas review where the state courts have denied relief after discussing both a procedural default and the merits of the claim. He claims that, under these circumstances, the Fifth and Tenth Circuit ignore the alternate procedural default holding and address the merits because the state court addressed the merits. Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981); Braiser v. Douglas, 815 F.2d 64 (10th Cir. 1987). By comparison, the Third and Seventh Circuits do acknowledge the procedural default and bar habeas review of the merits even if the state court addressed the merits as an alternate holding. Caruso v. Zelinsky, 689 F.2d 435, 439-440 (3rd Cir. 1982). Harris asks this Court to resolve this conflict by setting a uniform habeas standard in instances where the state court relies on "twin grounds"--both state and federal grounds--for affirming a criminal conviction.

However, there is no basis for this Court to intercede for several reasons. First, there is no conflict. This Court has made it plain that when a state prisoner allegation is barred on state procedural grounds, habeas review of that claim is inappropriate. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977); County Court of Ulster Cty. v. Allen, 442 U.S. 140, 99 S.Ct. 2213 (1979). Accordingly, the Circuits are in agreement that, where the state relied on the procedural default, habeas review is inappropriate even if they alternatively rejected the claim on its merits. United States ex rel. Veal v. DeRobertis, 693 F.2d 642, 650 (7th Cir. 1982); United States ex rel. Caruso v. Zelinsky, 689 F.2d 435, 440 (3rd Cir. 1982); Phillips v. Smith, 717 F.2d 44, 48 (2nd Cir. 1983); Dobbert v. Strickland, 718 F.2d 1518, 1524-1525 (11th Cir. 1983); Shepard v. Foltz,

771 F.2d 962, 965 (6th Cir. 1985); Davis v. Allsbrooks, 778 F.2d 168, 175 (4th Cir. 1985); Cook v. Lynaugh, 821 F.2d 1072 (5th Cir. 1987).

Although Harris claims that the Fifth Circuit ignores a state court's alternate procedural default holding, this is simply not true. Just last year, the Fifth Circuit in Cook v. Lynaugh explained that:

> The rule in this circuit is that, when a state court bases its decision upon the alternative grounds of procedural default and a rejection of the merits, a federal court must, in the absence of good "cause" and "prejudice," deny habeas relief because of the procedurdal default.

Cook v. Lynaugh, 821 F.2d 1072 (5th Cir. 1987); Accord, Ratcliff v. Estelle, 597 F.2d 474, 475-476 (5th Cir. 1979). Harris has failed to establish a conflict among the Circuits.

Furthermore, even if there were a conflict, this is not the type of case that would be the proper vehicle for resolving such conflict because Harris could never benefit from this Court's intervention. First, in light of Sykes and Ulster County and other decisions where this Court addressed procedural default, it is clear that the Seventh Circuit's analysis is correct and would be affirmed. In other words, the decision below is correct and should not be disturbed.

Second, even if this Court decided that the decision below was not correct and remanded for review on the merits, Harris's conviction would still have to be affirmed. The district court judge who went beyond the waiver and addressed the merits found that Harris failed to establish a constitutional violation. The Seventh Circuit judge, who also went beyond the waiver and addressed the merits, concurred in the judgment on the same assessment that Harris failed to establish a constitutional violation. Thus, if this Court remanded for a determination on the merits, the Seventh Circuit would still have to deny the writ on this record. There is no basis on which Harris could ever benefit by this Court's intercession. He has failed to provide a reason why this Court should accept review.

2. This Court Has Already Fully Addressed The Issue Of How To Interpret A State Court Opinion That Is Ambiguous As To Procedural Default; Furthermore, There Is No Conflict Among The Circuits On This Issue.

Harris also claims there is a conflict among the Circuits in instances where a state court opinion is ambiguous as to whether a claim was denied because of a state procedural default or on its merits. In this case, the Seventh Circuit undertook to discern whether the state court intended to rely on a procedural default. By comparison, Harris claims that the Fifth Circuit presumes a state court addresses the merits wherever its action appears ambiguous. Henry v. Wainwright, 686 F.2d 311, 314, and n.4 (5th Cir. 1982); see also Rosenfield v. Durham, 820 F.2d 52 (2nd Cir. 1987).

First, there is no need for this Court to address the issue at all. This Court already addressed this issue in County Court of Ulster Cty. v. Allen, 442 U.S. 140, 147-154; 99 S.Ct. 2213, 2219-2223 (1979), where it established the manner in which federal courts discern whether a state court enforced an independent and adequate state procedural ground that would bar federal habeas review. In the absence of an express state court default finding, this Court examined whether the state had a procedural default provision that could have barred state appellate review of the claim raised, whether the claim raised would have fallen into an exception to the ordinary default rule, whether the prosecution argued that the claim was procedurally defaulted, and whether the state reviewing court implicitly excused any default by addressing the merits. Ulster County, 442 U.S. at 147-154; 99 S.Ct. at 2219-2223.

Second, there is no conflict on this issue at all. The Seventh Circuit, the Fifth Circuit and the Second Circuit each examine the state court record to discern whether the state enforced a state procedural ground that bars federal habeas review in the same manner--the manner established in Ulster County. For instance, in the case at bar, the Seventh Circuit noted that the Illinois appellate court did not explicitly

state that Harris's claim was defaulted but it did note that failure to present an issue on direct appeal precludes state post-conviction review unless a defendant can show it was impossible to present the claim on direct appeal. Harris, 822 F.2d at 684. It examined the record to find that all the grounds, save one, could have been raised on direct appeal. Harris, 822 F.2d at 684. Without expressly finding that all other claims were waived, the Illinois court then proceeded to a short discussion of general standards for finding a claim of ineffective assistance of counsel. Harris, 822 F.2d at 684. Next, it analyzed all the grounds and found that there was no denial of the effective assistance of counsel. Harris, 822 F.2d at 684.

The Seventh Circuit concluded that the opinion included no explicit finding of waiver nor an explicit finding of intention to ignore the waiver. Harris, 822 F.2d at 684. It was ambiguous in that it addressed the merits of some of petitioner's claims which had clearly implied were waived. Harris, 822 F.2d at 684. However, a full reading of the state court opinion demonstrated that the state intended to find that all grounds were waived except one. Harris, 822 F.2d at 684. In an alternate holding it rejected each of the claims on the merits. Harris, 822 F.2d at 684. This alternate holding did not demonstrate an intention to ignore the procedural default. Harris, 822 F.2d at 684. Therefore, Illinois' enforcement of an independent and adequate state procedural ground barred federal habeas review of Harris's claims. Harris, 822 F.2d at 684.

Similarly, in Henry v. Wainwright, the Fifth Circuit examined state court language that suggested that the Florida courts dealt with Henry's claims on the merits. Henry, 686 F.2d at 313. While this language alone did not resolve the default issue, the Fifth Circuit said its conclusion was reinforced for two reasons. Henry, 686 F.2d at 314. First, the record disclosed no procedural default whatsoever. Henry,

686 F.2d at 314. Second, state law would have required that any default be excused because, in death cases, the Florida Supreme Court exercises a special scope of review enabling the excusal of procedural default. Henry, 686 F.2d at 314. Under the "situation presented here," where the state court was ambiguous on the default question, Florida must be presumed to apply its own rules to address Henry's claim in a death case on the merits.

Harris twists this conclusion to suggest that in all habeas cases, when the state court opinion is ambiguous, the Fifth Circuit presumes that the state court addressed the merits. (Petitioner's Petition at 8-9). Actually, Henry followed Ulster County in the same manner as the Seventh Circuit in this case by examining the state court's intention to the extent possible and found it had no intention to enforce a procedural bar in the case at hand. Henry is not in conflict with this Court or any other Circuit. It is Harris who creates a conflict with an incorrect interpretation of Henry.

Furthermore, despite Harris's claim, the Second Circuit also follows Ulster County and the other Circuits. In Rosenfield v. Durham, 820 F.2d 52, 55 (2nd Cir. 1987), the Second Circuit discerned the New York court's intent by examining its opinion which never mentioned procedural default but explicitly stated that defendant's allegations did not "merit" reversal. It found no intention by New York to enforce a procedural bar.

Since this Court has already fully addressed this issue and since there is no conflict among the Circuits, Harris has not provided any reason why this Court should intercede. The petition must be denied.

3. There Is No Reason To Remand For A Cause And Prejudice Hearing Where Harris Has Failed To Make A Colorable Claim Of Cause And Prejudice And Where The District Court's Finding Of No Constitutional Violation On The Merits Demonstrates That Harris Could Not Make A Showing Of Prejudice.

Lastly, Harris asks this Court to remand this cause for an opportunity to establish cause and prejudice. But this record

clearly reflects his inability to demonstrate prejudice. A showing of prejudice to overcome a state procedural default means "actual prejudice resulting from the errors of which he complains" and "actual prejudice of a degree sufficient to justify collateral relief." United States v. Frady, 456 U.S. 152, 168, 102 S.Ct. 1584, 1594 (1982). In other words, prejudice requires the same showing of prejudice required to justify a granting of the Great Writ.

But at bar, the district court which addressed the merits of Harris's claim already determined that the writ could not issue because he failed to show both that counsel was ineffective and that he was prejudiced by counsel's performance. Again on appeal, Court of Appeals Judge Cudahy concurred on the theory that, while he would not treat the ineffective assistance of counsel issue as waived, he would affirm the district court's determination that on the merits the writ should not issue since counsel was not constitutionally ineffective. Thus, Harris's representation to this Court that he deserves an opportunity to show prejudice is useless and a waste of the federal judiciary's valuable time.

Moreover, Harris had the chance to make out a colorable claim of cause and prejudice in the lower courts, specifically in a petition for rehearing before the Seventh Circuit after its decision. He also had the chance to include a colorable claim in his petition to this Court but he hasn't. Therefore, this Court should not order a remand for a hearing where Harris fails to make a colorable claim of cause and prejudice and where this record demonstrates that he could not make a showing of prejudice.

CONCLUSION

WHEREFORE, the respondent asks this Court to deny the petition for writ of certiorari.

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January 29, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. WARREN LEE HARRIS Petitioner,	)	
v.	)	No. 80 C 513
MARVIN REED Respondent.	)	

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This petition for a writ of habeas corpus, 28 U.S.C. §2254, is before the court for entry of findings of fact and conclusions of law. Petitioner Warren Harris alleges that he was denied effective assistance of counsel at this state court trial for murder and is therefore incarcerated in violation of the Sixth Amendment to the United States Constitution, as applied against the states through the Fourteenth Amendment. On April 8, 1985, this court denied the respondent's motion for summary judgment. That opinion is reported at 608 F.Supp. 1326. An evidentiary hearing was held over three days in November of 1985, and post-trial memoranda became fully briefed on February 26, 1986. Although this is a close and difficult case, the court determines that petitioner has not met his burden of showing that his conviction was constitutionally invalid, and therefore enters judgment for respondent.

Findings of Fact

The chief omissions of which petitioner complains concern trial counsel's failure to interview and call certain occurrence witnesses who might have identified someone other than petitioner as the assailant, and trial counsel's failure to call proferred alibi witnesses to the stand. Other trial errors are alleged as well. In order to assess the merits, a full history of counsel's pre-trial and trial performance is necessary.[1/]

1. Pursuant to a two-count information, petitioner Warren Lee Harris was charged with the murder of one Ernest ("Pete") Howard in August of 1977. Petitioner entered a plea of not guilty and Todd Musburger of the Cook County Public Defender's Office was appointed to represent him. Musburger had been with the public defender's office for about four years. Harris's case was Musburger's first murder jury trial, although he had conducted several felony jury trials. Musburger was joined by Kathryn Kuhlen as co-counsel.

2. On September 7, 1977, a preliminary hearing was conducted before the Honorable David J. Shields of the Circuit Court. The chief witness at the preliminary hearing was Antonio Slater, who testified that on July 9, 1977, at approximately

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1/ Designations to the hearing transcript are by Volume Number, (I, II, or III) and page number. References to exhibits are to petitioner's exhibits unless otherwise noted, and references to the state court trial transcript are noted as "Tr."

10:00 p.m., he was driving on the 1500 block of South Christiana Street in the City of Chicago. At that time, Slater heard a gunshot and saw a man fall to the ground. He looked around and saw another man with a pistol in his hand run to a Buick Electra and get in. Slater testified that he recognized the man as petitioner, whom he had seen periodically in the vicinity of a liquor store at 13th and Kedzie Streets, and knew as "Wayne."

3. On cross-examination, Musburger elicited that Slater did not hang out on South Christiana regularly, that Slater had turned off onto Christiana from Douglas Street, and that Slater had been stopped on the street for between 3 to 5 minutes because the Buick Electra had blocked his way. Slater testified that the man he saw running away from the victim was a 5'11" black male, weighing approximately 165 pounds, and wearing black pants and a beige knitted sweater. Slater added that Christiana has orange street-lights, but that the incident did not occur under one. Musburger attempted to elicit information as to how and when Slater first spoke to the police, but the court sustained objections to this line of questioning.

4. Pursuant to pre-trial discovery, counsel for the defense obtained copies of the police reports relative to the investigation of Howard's homicide. By virtue of these materials, counsel learned the following (the reports contained addresses and phone numbers for all witnesses):

A. Laverne Tapes, the victim's common-law wife, informed the police that the victim, Ernest Howard, was a dope dealer who usually dealt in the area of 16th and Christiana. (Ex. 39)

B. Maurice Williams was at about 16th and Christiana on July 9, 1977 when he heard a gun shot and heard Howard call his name. Howard told Williams that he had been robbed and knew the offenders, but did not mention their names. (Exs. 38, 41).

C. Betty Larry, common-law wife of Maurice Williams, informed the police immediately after the shooting that Curtiss Fowlkes had witnessed the incident and had told her that Howard's assailants were two male negroes, one of whom wore a red shirt and dark pants, and that they had fled the area driving a maroon and white 1968 Buick Electra. (Ex. 38)

D. Larry also told the police that Joanne Hightie had told her that she (Hightie) had seen two male negroes running through a playlot at 1521 S. Christiana immediately after the shooting, that one of them had on a red T-shirt with dark pants, and that the other was wearing a white T-shirt. According to Larry, Hightie had also seen a white-maroon Buick Electra 225, but the vehicle had three occupants. Larry herself recalled that at the time she had spoken to Fowlkes, a male negro wearing a white T-shirt appeared to be with Fowlkes. (Ex. 39).

E. After some initial difficulties locating him, the police interviewed Curtiss Fowlkes, who stated that he had seen Howard and a man wearing a red shirt talking near the corner of 16th and Christiana Street. Fowlkes turned away for a few seconds and heard a shot. When he turned around, he saw Howard fall to the ground and then saw the man in the red shirt enter a grey 1968 Buick Electra with chrome manifold pipes. Fowlkes described the man as being a male negro, age 25-26, 5'10" to 6' tall, with a medium build and an afro haircut. This description fit petitioner.

F. Leroy Carter, 1528 South Christiana, was also interviewed by the police. Carter indicated that he had been sitting in his car with his girlfriend (Joanne Hightie) in front of 1528 South Christiana with the radio on, the windows closed, and the air conditioner running. At about 10:00 p.m., Carter saw the described man with the white T-shirt running into the playground in a north-east direction from 16th and Christiana. (Ex. 41).

G. Rose Anderson indicated that the same man described by Carter approached her at a neighborhood tavern just before midnight, told her he had been with "Pete" at the time of the shooting, and asked if Pete had died yet. Anderson added that before she could respond, the man noted Darryl Tapes, the victim's brother-in-law, arriving,

and left hurriedly. (Ex. 40). Through Anderson's cousin, the police learned that the man was known as "Buster" and lived in the vicinity of 12th and Lawndale.

H. Clarence Gibson, a friend of the decedent, told police that on the night of the incident, he heard a shot, went outside and met "Buster" who was walking toward 16th Street. Buster informed Gibson that "Pete" had been shot, and the two men went back to the scene of the crime to watch the police carry the body away.

I. The police also interviewed Alice Marie Riles, 1515 S. Christiana, who related that she had been sitting on the front porch of her house when she heard a shot. Immediately thereafter, Riles saw two men running in a northeasterly direction and into a vacant lot near the playlot described by Carter and Hightie.

J. The police located Buster, now identified as Melvin McWhorter of 1306 S. Lawndale. McWhorter agreed to come to Area 4 headquarters for questioning, was advised of his rights, and then denied any knowledge of the shooting.

K. Both Riles and Carter, separately viewing a lineup, positively identified McWhorter as the man running through the playlot arcund the time of the shooting. (Exs. 43, 44). Upon further questioning, McWhorter stated

that he was with one George Williams (a/k/a/ "PRO") at the time of the shooting.

L. At a later date, McWhorter admitted being untruthful in his earlier interview, and related that on the evening of the homicide he and George Williams had gone to 16th and Christiana to buy narcotics. Standing in the vacant lot on the east side of Christiana, McWhorter noticed several persons on the west side of the street, including petitioner Warren Harris. McWhorter said he did not see Howard at that time, or he would have bought dope from him. McWhorter then heard a gunshot and saw Harris walking south on Christiana and then west on 16th Street away from the shooting. McWhorter further related that on Tuesday, July 12, 1977, Harris approached both him and George Williams and warned that they would be harmed if they told anyone Harris had been present when Howard was shot. McWhorter had known Harris for about four years and positively identified a photo of him.

M. On August 3, 1977, the police finally located and interviewed George Williams. Williams told the police that he and McWhorter were standing in a gangway across the street from where Howard was later found when they heard a hot. Williams walked across the street and saw the victim and numerous other persons in the surrounding area. Williams was asked if he saw Harris at the scene,

and he answered no but that he had heard from some persons in the area that Harris was the killer. (Ex. 46).

N. Through an unidentified informant, police later were informed that one Antonio Slater had witnessed the incident; Slater was located on August 19th and gave the police a written statement. This statement largely corroborated Slater's testimony except for the important fact that Slater said he had driven onto Christiana from 16th Street, not Douglas Street as later testified. (Christiana is a one-way southbound street, and 16th Street is south of the block where Howard was killed.) Slater also mentioned that his headlights had caught Harris's face, and that Harris got into the Buick and drove off passing him. Slater then looked at a group of five photos and identified Harris as the shooter.

O. Based on Slater's statement, Harris was apprehended for investigation. The police found Harris lying in the rear seat of a parked auto at 1201 S. Lawndale, arrested him, and advised him of his rights. Harris said he was not present when the victim was shot and would not make any further statements. The police charged Harris with murder and officers were ordered to locate Curtiss Fowlkes to see if he could identify Harris. The record nowhere reveals whether Fowlkes was ever located.

5. Based on the foregoing, Musburger obtained through further discovery the rap sheets of McWhorter, George Williams, Darryl Tapes, Betty Larry, Curtiss Fowlkes, Leroy Carter, and others named in the police report but of no consequence here. Antonio Slater had no criminal record; the other witnesses all did.

6. Musburger could not recall what specific efforts he made to interview the witnesses named in the police files. He recalled making such efforts generally but having very little success in finding witnesses whose testimony would have been helpful. (I. 82, 103). He specifically recalled attempting to interview a man in a basement apartment who refused to cooperate, and remembered speaking to two women across the street from that apartment who told him that if called to testify they would identify Harris as the shooter. (I. 103). At his deposition, Musburger recalled that these women had previously said something helpful to the police. (Ex. 2, pp. 47-49). He could remember no names for these witnesses, but conjectured at the hearing that Alice Riles was probably not one of the two witnesses. Although Leroy Carter lived in a basement apartment on Christiana, he testified that he never spoke to a defense attorney before trial. The court finds it probable that neither Carter nor Riles were among the witnesses contacted prior to trial.

7. Musburger made no attempt to interview Antonio Slater further, and either could not find George Williams or could not get George Williams to cooperate. There is no evidence as to whether

Musburger did or did not interview McWhorter, but Harris has never alleged that Musburger failed to interview McWhorter, or that he (Harris) was prejudiced by this failure.

8. Initially, Harris informed Musburger that he had been in Cook County Hospital on or around the night of the murder, July 9, 1977, and therefore couldn't have committed the crime. Harris testified that he never claimed to have been in the hospital on July 9th, but Musburger remembered otherwise. Although Musburger's memory was sketchy, and Harris did not strike the court as a liar, the court believes that Musburger's memory is probably accurate on this point. Musburger subpoenaed the hospital records to learn that Harris had entered Cook County Hospital on July 13, 1977, after the crime occurred, and had told the doctors on entering that he had been injecting heroin as recently as two days before. (Resp. Ex. 5). Those records also revealed that Harris had been released from Madden Mental Health Center in Hines, Illinois, where he had been treated for hallucinations, on July 7, 1977. (I. 23; Ex. 8). There is no evidence that Musburger subpoenaed these other medical records, and probably he did not.

9. Prior to trial, Musburger spoke with a group of three to six people, including petitioner's mother, Emma Harris, petitioner's common-law wife Jewel Connors, and possibly Jewel's sister Genise Connors. These people informed him that petitioner had been ill at the Connors' home on the day of the incident. (II. 35). Musburger spoke with these people at least twice (I. 13),

but determined that they were not believable and would not have withstood cross-examination. He recalled thinking that the witnesses were inconsistent among themselves, although he could not remember specifics, and that some or all of them seemed to be high on drugs. (I. 74-76; II. 25-26). His notes reflect that Mrs. Harris had also informed him she was "positive Warren was home sick with her." (Ex. 65). Musburger's disbelief in these witnesses was fueled by his frustration that Harris's earlier hospital alibi had proven false. (I. 90-92; II. 26).

10. Musburger also spoke with two men whom Mrs. Harris identified at trial as being Ronnie Harris, Warren's brother, and Jim Greer, a friend of Ronnie's. (II. 37-38, 82). Both men were willing to testify that Slater and McWhorter were friends and that they had seen the two men together in Chicago's Central Park on the south side. (II. 37-38). Musburger's trial notes make reference to Ronnie Harris and the Central Park area (Ex. 66), but Musburger had no recollection of the names or the allegation. Neither witness was called to testify at trial.

11. Musburger did recall a general concern that Harris's proposed witnesses appeared to be heroin addicts. (I. 75, 96). He emphasized that it was his strategy to keep out any reference to heroin abuse lest the jurors be prejudiced against Harris for drug involvement. (I. 97). While there is no evidence other than Musburger's impression that these witnesses were in fact drug

users, the court has no basis for concluding that his perception was demonstrably incorrect.

12. Musburger and co-counsel Kuhlen did not visit the scene of the crime until approximately one month before trial, at which time there was snow on the ground and the leaves were off the trees. (I. 24-25). Although the crime occurred on a summer's night, the only photos of the scene prepared by the defense were taken in the winter during daylight hours.

13. After the preliminary hearing, Musburger never verified whether in fact there was a liquor store at 13th and Kedzie where Slater might have seen Harris. There is in fact a billiards parlor at that corner where liquor is apparently sold.

14. On December 15, 1977, the defense answered ready for trial and jury selection in People v. Harris before the Honorable Louis Garippo of the Circuit Court. By this time, defense counsel had abandoned any interest in an alibi defense, and intended to rely on the state's inability to prove Harris guilty beyond a reasonable doubt. (Ex. 14). Prior to the opening statement, Laverne Tapes, Alice Riles, Leroy Carter, and a Mr. Tapes (presumably Darryl) were identified as being present in the courtroom. (Ex. 1, p. 22-23). Musburger informed the court that Tapes and Riles had been subpoenaed. Id.

15. Upon conclusion of the prosecution's opening statement, Kuhlen made the opening statement for petitioner. In her statement, she identified Melvin McWhorter (who had not been

mentioned in the prosecutor's opening) and made the following remarks:

> We believe the evidence will also show that the police learned that two persons immediately after the shooting were seen running away from the scene of the shooting in a northeast direction through a lot on the north side of Christiana. Through further investigation, the police learned that one of those individuals was Melvin McWhorter. They had Melvin McWhorter come to Area Four Police Headquarters, advised him of his rights and interrogated him.
>
> At that time he denied knowing anything about the shooting. They then placed Mr. McWhorter in a lineup and two persons positively identified him as one of the individuals they had seen running away from the scene immediately after the shooting.
>
> The police then confronted Mr. McWhorter again and Mr. McWhorter changes his story and says what he said before was a lie, and then tells the police that he had gone into the neighborhood to purchase narcotics, that he was across the street at the time of the shooting but that he didn't see the shooting itself.

(Tr. 31-33). Kuhlen continued, discussing how Slater's statement to the police six weeks after the shooting switched the focus of suspicion from McWhorter to Harris, and asking the jury to examine closely Slater's credibility.

16. Musburger recalled interviewing witnesses during the course of trial, without substantive results. (I. 103; II. 11-12). Just before opening statement, Kuhlen advised the court that both Alice Riles and Leroy Carter "might be called in rebuttal, depending on what the state has." (Tr. 23). Leroy Carter recalled that on the day he showed up at the courtroom he spoke in the hallway with a male lawyer who told him that they might need him and then they

might not. (III. 11-12, 21). The court finds that the person was probably Musburger, even though Musburger himself did not recall the interview, since Carter would have been of no use to the prosecution. Had Carter been called to testify, he would have said that he saw a man other than Harris running across a playlot shortly after the shooting, and that the man was the same he'd identified at the police line-up. Carter did not witness the shooting, however, and could not remember at the evidentiary hearing whether he'd seen a Buick Electra or not. (III. 6, 17).

17. The state called six witnesses: Howard's father, to testify to the fact of death; Maurice Williams, who came to the victim's aid just after the shooting; Officer Joseph Michello, who appeared on the scene shortly thereafter; Antonio Slater; the officer who arrested Harris; and the doctor who performed the autopsy.

18. On direct examination, Williams was asked whether he knew a person by the name of Buster. He said yes, and, in response to further questions, said he saw Buster at the crime scene sometime after the police arrived. (Tr. 46). On cross-examination, he reiterated that it wasn't until after the police arrived that he saw Buster. (Tr. 51).

19. During the prosecution's case, Musburger made an oral motion in limine to preclude the state from eliciting any testimony as to threats Antonio Slater had received in connection with the case. The prosecutor represented to the court that shortly

after Harris's arrest, Slater's automobile was shot up. Harris himself was in custody at the time. The prosecution advised it would not elicit the information on direct examination, and the matter was dropped. (Tr. 54-55).

20. Slater was the sole witness at trial to identify Harris. Slater testified on direct examination that he was driving southbound on Christiana from Douglas Street when he heard a shot and witnessed a man push down another man, who fell. The man who remained standing then turned and ran to a Buick Electra sitting in the street, momentarily faced Slater, pulled up a pistol at Slater, and jumped into the passenger seat of the car. Slater's headlights picked up the man's waist, and Slater recognized the man as Wayne, whom he knew from a poolroom at 13th and Kedzie. Slater also pointed out Harris in the courtroom and mentioned that gold street lights along Christiana were lit. Slater further testified that he went to the police station on his own, and that he didn't know anyone by the name of Buster or Melvin McWhorter.

21. On cross-examination, Musburger brought out that Slater had waited almost six weeks before talking to the police. Musburger also highlighted several inconsistencies between Slater's pretrial statements and his trial testimony. In particular, Musburger brought out that Slater's signed statement to the police refers to turning onto Christiana from 16th Street, not Douglas; that Slater told the police that Harris got into a car which "drove off past" him instead of one which blocked his way in front; and

that he told the police a whole bunch of people came around after the shooting but said at trial that he saw no one else other than Howard and petitioner. Slater was also impeached as to whether his car was stopped for mere seconds or a few minutes, and admitted that he had not seen Harris at the poolroom for over two years. Musburger did not impeach Slater's statement that he had gone to the police voluntarily, that there were streetlights, or Slater's statement at trial that he knew Harris from a poolroom (as opposed to a liquor store) at 13th and Kedzie. (I. 27).

22. On December 21, 1977, the defense rested without putting on any evidence. Harris first learned of counsel's decision not to put on a defense earlier that morning, when Musburger advised him that Slater had been successfully impeached. (II. 78). Harris went along on counsel's advice. Musburger recalled that at the time the state closed their case, he and Kuhlen felt that the prosecution's case was weak and that the jury "would be out a very short time and give a not guilty to our client," and that this was the "biggest reason" why no witnesses were called. (II. 32). Musburger also must have been aware that this meant abandoning the McWhorter line of defense, since he orally moved to preclude the state from commenting in closing on Kuhlen's opening statement. (Tr. 128).

23. Later that same day, the jury returned a verdict of guilty. Immediately afterwards, the alibi witnesses angrily confronted Musburger outside the courtroom to ask why no witnesses

had been called in Harris's defense. Musburger recalled the confrontation as "not a comfortable moment." (I. 22).

24. Charles Thomas, a letter carrier for the United States Post Office since 1969, was at the time of petitioner's trial the common-law husband of Genise Connors, the sister of petitioner's common-law wife, and knew Warren socially. Thomas was available to testify at petitioner's trial but was never contacted by petitioner's lawyer. Had Thomas been called, he would have been willing to testify that petitioner was home sick the evening of the murder, July 9th. Thomas recalled being at the Connors' house after he got off work that day to assist them in preparing for movers who were to come the next day. (II. 56). Thomas was a credible witness, has an honorable discharge from the army, and would not have presented the drug problems that Musburger noticed with petitioner's other proposed witnesses. However, Thomas's testimony would not have been terribly helpful, since the only reason he was sure of the date was that Genise had told him it was the day "that Warren was at the hospital and we was all moving and everything." (II. 53).

25. Genise Connors is a high school graduate and is presently employed as a lab technician at Chicago Rawhide. (III. 32-33). In July of 1977, Ms. Connors' mother and Jewel Connors lived at 1106 S. Independence, Chicago, Illinois. (III. 34). Genise Connors spoke to Musburger on two occasions prior to trial and informed him that she was willing to testify. (III. 40-42). She was never called to testify at petitioner's trial.

Had Genise Connors appeared at petitioner's trial, she would have testified that petitioner was home sick on the evening of July 9, 1977, while she and the other members of her family were engaged in packing and loading her mother's house incident to Mrs. Connors' move to Mississippi. Genise Connors' testimony as to the events of July 9, 1977, were not credible. She knew Harris was sick in bed one night during three days of packing, but she couldn't single out which one. (III. 36-37, 43-44). The only thing Connors could distinctly remember at the evidentiary hearing was that Harris was arrested on the corner outside her home on Independence the day or so after the move. (III. 45-46, 50). According to the state court trial testimony, the police records, and petitioner's own testimony here, petitioner was arrested more than a month later at a different location. (III. 63). Connors' certainty on this clearly erroneous point led me to believe that she was not a credible witness, and most likely would not have been a credible alibi witness back in 1977.

26. Harris himself testified to being home sick around the night of the move, and said he was sure of the date because of his release from the hospital. Records show, however, that Lawrence Moving came to the Connors house on July 8th, the day before the murder. Thomas remembered the events happening before the movers came, on a day he worked, and apparently on a day Genise said Warren had been at the hospital. The court finds that Warren was home sick one night in early July, but that the evening in

question was probably Thursday, July 7, 1977 (the date petitioner was released from Madden), or even Friday, July 8, 1977, but probably not Saturday, July 9, 1977.

Conclusions of Law

1. Under Strickland v. Washington, 104 S.Ct. 2052 (1984), a criminal defendant who wishes to set aside his conviction for ineffective assistance of counsel must demonstrate that "counsel's representation fell below an objective standard of reasonableness," id. at 2065, and that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

2. The "reasonable probability" standard of Strickland is more restrictive than the standard applied by the Seventh Circuit in United States ex rel. Cosey v. Wolff, 727 F.2d 656, 658 (7th Cir. 1984), where the court said: "Once a court finds that . . . the counsel's [unprofessional] acts or omissions may have impaired the defense, the burden of proof is on the government to prove beyond a reasonable doubt that the trial counsel's ineffective assistance did not affect the verdict." In effect, petitioner must show that the error was probably not harmless. However, a habeas petitioner raising an ineffectiveness claim need not show that counsel's

performance "more likely than not" affected the outcome of the trial. Strickland, 104 S.Ct. at 2068.

3. Effective representation hinges on adequate pretrial investigation, and therefore the right to competent counsel imposes a correlative duty on defense counsel to undertake reasonable steps in determining all avenues of defense. Crisp v. Duckworth, 743 F.2d 580, 583 (7th Cir. 1984), cert. denied, 105 S.Ct. 1221 (1985). Strategic choices made after less than complete investigation are reasonable only to the extent that professional judgments support the limitations on further investigation. Strickland, 104 S.Ct. at 2066. An informed tactical choice of trial strategy, however, is not reviewable on an ineffectiveness claim. United States v. Dyer, 786 F.2d 812, 816 (7th Cir. 1986).

4. Pursuant to the above, defense counsel should ordinarily interview not only his or her own witnesses, but also those that the state intends to call. Crisp, 743 F.2d at 584; United States v. DeCoster, 487 F.2d 1197, 1204 (D.C. Cir. 1973).

5. Although each allegedly incompetent act or omission must be examined individually, the cumulative efffect of all errors must be examined in light of the totality of the circumstances, including the strength or weakness of the government's case. Strickland, 104 S.Ct. at 2069; Crisp, 743 F.2d at 583.

6. Petitioner has failed to show that his attorney acted unreasonably in deciding that petitioner's proferred alibi witnesses were unreliable and thereby declining to call them as witnesses.

The chief alibi witness, Ms. Connors, struck this court as lacking credibility, and the moving records weaken rather than substantiate the alibi.

7. Petitioner has failed to show that counsel acted incompetently in not calling any of the doctors at Cook County Hospital to corroborate the alibi witnesses' story that he was ill on July 9, 1977. The hospital records would have injected the issue of Harris's heroin use into the trial, which Musburger sensibly wished to avoid. Moreover, Musburger had already decided that the alibi was not credible, and therefore there was nothing to corroborate.

8. Petitioner has failed to show prejudice from counsel's alleged failure to interview or call as witnesses Investigators Peck and Sykes to impeach Slater as to where the victim was shot. The police records sustain Slater's testimony that Howard was shot on the sidewalk, and neither investigator was called at the evidentiary hearing to testify otherwise.

9. Petitioner has failed to show prejudice from counsel's failure to interview or call as a witness George Williams. Williams did not appear at the evidentiary hearing, his statements to the police are not exculpatory of petitioner, and it therefore remains speculative whether Williams' testimony would have helped the defense.

10. Petitioner has failed to show that counsel unprofessionally failed to interview or call Joann Hightie, or that

he was thereby prejudiced. Given counsel's admission that he probably would not have subpoenaed Riles unless he thought she might be helpful, that would make it likely that Hightie was one of the women he spoke to on Christiana St. While the evidence is unclear, even if counsel did not interview Hightie, it is speculative whether her testimony would have helped the defense. Although Hightie had told the police saw two men running through a playlot, she also saw a Buick Electra similar to the car described by Slater. While Hightie "might" have testified at trial that the car was a different color, it is not reasonably certain she would have, and the discrepancy could be seen as a minor point.

11. Assuming that Musburger never interviewed Fowlkes (the evidence is unclear), petitioner has nonetheless failed to show prejudice from this omission. It appears from the circumstances that Fowlkes would have strengthened the government's case in that he described Howard's assailant as age 25-26, 5'10" to 6' tall, medium build, dark complexion, and medium afro hairstyle -- terms which matched Slater's description and which fit petitioner. Fowlkes had also seen the assailant get into a Buick Electra parked alongside the scene, and was according to Betty Garry with McWhorter after the crime. Although Fowlkes testified to a different colored shirt and car than had Slater, these discrepancies might have been explained or been viewed as minor in light of the significant similarities. It is troubling that the police records indicate a search for Fowlkes without further mention, but this court never

learned what further testimony from him would have produced. Petitioner has therefore not shown that Fowlkes' testimony was reasonably likely to help his defense so as to show prejudice from counsel's omission.

12. Petitioner has failed to show that trial counsel was ineffective in that the defense photographs of the crime scene were taken during the day after leaves had fallen from the trees. Trial counsel was able to use the photographs to instruct the jury on the important point that no streetlights would have directly illuminated where Howard was shot, and there is no indication on this record that night pictures would have materially aided that impeachment. This impeachment by photograph also cures any alleged ineffectiveness regarding counsel's failure to cross-examine Slater about the streetlights; the photographs provided a surer route to effective impeachment, and, contrary to petitioner's allegation #12, Slater's preliminary hearing testimony as to the presence of streetlights was not inconsistent with his trial testimony. While night pictures, if obtainable, might have been preferable, the benefit is speculative and counsel's oversight is in any event too minor to justify vacating Harris's conviction.

13. Petitioner has failed to show prejudice from counsel's failure to investigate the existence of a poolroom at 13th and Kedzie, since the testimony at this trial indicates that there is in fact a billiards parlor at that corner. While Slater referred at the preliminary hearing to the poolroom as a liquor store and

not a poolroom, petitioner's counsel suggested at one point in this court that the billiards parlor in fact sells liquor. The court does not find counsel's failure to impeach Slater on this discrepancy a significant omission which would have been reasonably likely to help the defense.

14. Petitioner has failed to show ineffectiveness in counsel's failure to offer into evidence the agreed stipulation that would have perfected the impeachment of Slater's trial testimony regarding whether he turned onto Christiana from Douglas Street. Slater had originally told the police that he had turned onto Christiana from 16th Street, which meant he would have turned onto Christiana (a southbound street) south of where the shooting occurred. On cross-examination, Slater denied ever telling the police that he turned off of 16th Street but admitted that his signed written statement said 16th Street. (Tr. 92). The parties worked out a stipulation that Officer Shine, if called to testify, would verify the accuracy of the signed statement as to what Slater had said. (Tr. 123-24, 128). The prosecution agreed to treat the impeachment as perfected, however, and the stipulation was never introduced. (Tr. 130). Musburger testified that he didn't want to aggravate the jury by further corroborating Slater's admission to an inconsistent statement. (II. 27-28). The court finds this explanation questionable, since a stipulation is hardly aggravating. The court notes, however, that the inconsistency was argued to the jury, and the prosecution, pursuant to its agreement, never mentioned

in closing argument Slater's denial of the inconsistency. The prejudice, if any, is too tenuous to support overturning petitioner's conviction.

15. Petitioner has not shown that counsel was ineffective for not impeaching Slater's testimony that he went to the police voluntarily. Under the McWhorter theory, which counsel had concluded was its best defense when trial began, having Slater voluntarily approach the police made it more likely that he was protecting someone. The failure to impeach Slater on this point by calling Officer Shine was neither unreasonable nor prejudicial, and possibly a tactical decision.

16. Petitioner has failed to show prejudice from counsel's failure to file a motion to disclose the identity of the informant. Musburger conceded at trial that this information could have been crucial had it provided a link between McWhorter and Slater, and the omission was not backed up by any professional judgment. Nonetheless, Musburger remembered no evidence of a McWhorter/Slater link, and petitioner has put forth no competent evidence at this hearing to show that McWhorter and Slater were in fact acquainted. It is therefore wholly speculative what such a motion would have revealed.

17. Petitioner has failed to show ineffectiveness in counsel's failure to interview Slater prior to trial. The need for such an interview was diminished in part by Musburger's ability to cross-examine Slater at the preliminary hearing, and any attempt at

an interview was problematic given that Slater's car had been shot at in an apparent threat attempt, which may or may not have been linked to petitioner. It is speculative on this record whether a pretrial interview would have enhanced Musburger's ability to impeach Slater in a material way.

18. Petitioner has failed to show prejudice from counsel's failure to put Ronnie Harris or Jim Greer on the stand to testify that McWhorter and Slater had been seen together in Chicago's Central Park. (II. 38). Police reports indicate that Slater in fact lived on Central Park. (Ex. 48). Musburger could not recall why he did not call these people to the stand. (I. 47-48). The state argues in its brief that these witnesses must have been among the witnesses whom Musburger thought were drug users. This is plausible, but Musburger's trial notes make reference to Ronnie Harris and the Central Park area, and the McWhorter defense, unlike the alibi defense, remained a viable theory at the time trial began. Thus it is doubtful whether or not the decision not to call Harris and Greer as witnesses was based on professional judgment. In any event, this court heard no testimony from either Greer or Ronnie Harris which would have enabled it to determine, as with Genise Connors, whether their testimony would have been credible, and therefore helpful to the defense.

19. Even if petitioner has shown ineffectiveness in connection with counsel's not putting Greer or Ronnie Harris on the stand, not taking proper photographs, and not interviewing Hightie,

Fowlkes, and Slater, these claims were never made in the state post-conviction hearing and are therefore waived under the doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977).

20. Although the evidence is very close, petitioner has failed to show prejudice and ineffectiveness in counsel's decision not to call Alice Riles and Leroy Carter as witnesses at trial. It is more probable than not that these witnesses were consulted by counsel at trial, however briefly, and that counsel then made a strategy decision at the close of the state's case not to put them on the stand. This strategy puzzled the court greatly at the hearing, since Riles' and Carter's testimony might have raised doubt by suggesting that the men runing from the scene were in fact the assailants, and Musburger's belief in a probable acquittal would not excuse putting on further helpful evidence.

Close examination of the police records, however, reveals that the McWhorter story was not as strong a defense as Kuhlen's opening statement suggests. While Carter would have testified that he saw two men, one of whom was McWhorter, run from the area just after the shooting, Carter could offer no further exculpatory testimony, and Musburger knew of several witnesses --Clarence Gibson, Curtiss Fowlkes, Betty Larry-- who would be called to corroborate Maurice Williams' testimony that McWhorter had in fact not left the scene. Actually putting on Riles and Carter as witnesses also raised the possibility that the prosecution would call McWhorter, whom Musburger knew was ready to finger his client.

Thus, the McWhorter defense was chiefly a viable theory for cross-examining the state witnesses, particularly if McWhorter took the stand, but does not appear to have been valuable as an actual defense. Kuhlen advised Judge Garippo that Carter and Riles might be called in rebuttal depending on the state's case, but Musburger remembered nothing substantive coming out of his continued witness interviews during trial. Moreover, the state weakened this defense by putting on only Slater as a substantive witness and eliciting from Maurice Williams that McWhorter had remained on the scene. Thus, the evidence suggests that Musburger's investigation led him to believe the defense would not have held up, and petitioner has put forth no evidence that the defense theory has merit as the true version of events. The court cannot conclude that trial counsel acted below a level of competence by raising the theory during opening argument but then abandoning the defense after further interviews and after the state had presented a perceptibly weak case.

21. The cumulative effect of all counsel's errors, while troublesome, does not make out a sixth amendment violation. Counsel was clearly remiss in not discussing his strategic decisions with petitioner. It is also probable from the record before this court that petitioner's counsel did not thoroughly investigate all witnesses named in the police reports, but the benefit which might have accrued from further investigation (and thereby the reasonableness of Musburger's conduct) is murky at best. As the state notes

in its post-trial brief, petitioner's version of the defense is still "no more than a version, even after an extended evidentiary hearing." Specifically, petitioner has not shown that further investigation would have strengthened rather than weakened the defense theory he claims his counsel unreasonably abandoned. Since the police reports are hearsay as to the truth of their contents, this court has insufficient evidence to find that further investigation would have benefitted petitioner. Petitioner has therefore failed to establish a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Conclusion

Accordingly, the court enters judgment for respondent, and sua sponte grants petitioner a certificate of probable cause for appeal. 28 U.S.C. §2253. Appointed counsel are directed to advise petitioner of his right to appeal and the procedures for filing an appeal.

It is so ordered.

Susan Getzendanner
United States District Judge

May 30, 1986